



Comptroller General
of the United States
Washington, D.C. 20548

Pogony
148715

Decision

Matter of: Balimoy Manufacturing Company, Inc.--
Reconsideration

File: B-250672.2

Date: March 10, 1993

Kenneth A. Martin, Esq., and Andrew B. Katz, Esq., Elliot, Vanaskie & Riley, for the protester.
Andrew T. Pogony, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's late receipt of the agency report is not a basis for reopening a protest dismissed for failure to file comments or express continued interest in the protest within 10 working days after receipt of agency report, where protester failed to notify the General Accounting Office (GAO) that it had not received the report until after the due date shown on the GAO notice acknowledging receipt of protest.

2. Generally, in determining whether comments on the agency report were timely filed within 10 working days of the protester's receipt of the agency report, the General Accounting Office (GAO) will rely upon its time/date stamp, unless there is other evidence to show actual earlier receipt by GAO.

DECISION

Balimoy Manufacturing Company, Inc. requests reconsideration of our December 8, 1992, dismissal of its protest under request for proposals (RFP) No. DAAA21-92-R-0027, issued by the Department of the Army for body assemblies for the 81 mm high explosive mortar projectile. In its initial protest, Balimoy argued that the agency had failed to conduct meaningful discussions with the firm. We dismissed the protest because Balimoy failed to file its comments on the agency report within the time required by our Bid Protest Regulations, 4 C.F.R. § 21.3(j) (1992).

We deny the request for reconsideration.

Balimoy filed its protest with our Office on October 1, 1992. We responded with a notice that acknowledged receipt of the protest and delineated the procedures and deadlines for filing both the agency report and the protester's comments. Specifically, the notice stated that the agency report was due on November 6, and the protester's comments were due 10 working days later. The notice also advised Balimoy to promptly notify our Office if, in fact, it did not receive the agency report on November 6; otherwise, we would assume that the protester received its copy of the report when we received ours. Concerning facsimile transmissions, the notice stated as follows:

"For purposes of our bid protest procedures, documents are considered filed when a time/date stamp is placed on the document. Facsimile transmissions will be time/date stamped upon receipt of the entire text of the filing. Transmissions received after business hours [5:30 p.m., eastern time]--including transmissions in which the last page is received after business hours--will be time/date stamped as received on the next business day."

Our Office received the agency report on the November 6 due date. Prior to filing its comments, Balimoy did not notify our Office of when it received the report.

On the business day of November 24, 1992, our Office received the protester's comments on the agency report submitted in response to its protest.¹ These comments contained the following statement:

"Balimoy received its copy of the Administrative Report on November 6, 1992 . . . these comments are timely filed [since] Veterans Day, November 11, 1992, was a federal holiday."

In our decision dismissing Balimoy's protest, we stated that in order to avoid delay in the resolution of protests, our Bid Protest Regulations provide that a protester's failure

¹As permitted by our notice, Balimoy sent its comments by facsimile transmission. The comments, dated November 23, were time/date stamped by our Office on November 24. Our dismissal was based on the latter date. The protester maintains that the time/date stamp should not control because it in fact transmitted the comments by facsimile at "approximately 5:15 p.m." on November 23. We discuss this issue more fully below.

to file comments within 10 working days, or to file a request that the protest be decided on the existing record, or to request an extension of the time for submitting comments, will result in dismissal of the protest. 4 C.F.R. § 21.3(j); Prio-Leau Culinary Servs., Inc.--Recon., B-236373.6, Jan. 23, 1990, 90-1 CPD ¶ 90; Electronic Research Assocs., Inc.--Recon., B-220291.3, Jan. 15, 1986, 86-1 CPD ¶ 46. We further stated that, by its own admission, the protester received the agency report on November 6, 1992. Excluding Veterans Day, 10 working days from that date was November 23, and the protester did not file its comments by that date. Therefore, since the protester failed to file its comments within 10 working days of the date it received the report (or to request an extension), we found that the protester had failed to comply with the filing deadlines in our Regulations. See Piedmont Sys., Inc., B-249801, Oct. 28, 1992, 92-2 CPD ¶ 305.

In its request for reconsideration, Balimoy first argues that its comments contained a "typographical error" inasmuch as the protester did not actually receive the agency report until November 9, 1992; since the protester filed its comments not later than November 24, the protester argues that it filed its comments with our Office within 10 working days of its actual receipt of the report.

The filing deadlines in our Regulations, prescribed under the authority of the Competition in Contracting Act of 1984, are designed to enable us to comply with the statutory mandate to expeditiously resolve protests. 31 U.S.C. § 3554(a) (1988); Green Mgmt. Corp.--Recon., B-233598.2, Feb. 27, 1989, 89-1 CPD ¶ 208. But for the provision requiring the protester to file its comments within 10 working days or to file a request that the protest be decided on the existing record, or to request extension of the time for submitting comments, a protester could await a copy of the agency report indefinitely, to the detriment of both the procurement process and our ability to expeditiously resolve the protest. See Environmental Health Research & Testing, Inc.--Recon., B-248931.3, Nov. 2, 1992, 92-2 CPD ¶ 297.

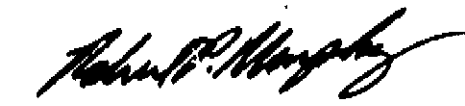
Balimoy was on notice of the November 6 due date since our notice acknowledged the protest and advised Balimoy to promptly notify our Office if it did not receive a copy of the agency report by that due date. Otherwise, our notice stated, we would assume that Balimoy received a copy of the report on the date that our Office received ours. As Balimoy did not communicate with our Office until it submitted its comments, the protest was properly dismissed,

IBI Sec. Serv. Inc., B-233740.2, Mar. 6, 1989, 89-1 CPD ¶ 242, and the protester's late receipt of the report is not a basis for reopening the protest. R & R Enters.--Recon., B-240926.2, Feb. 12, 1991, 91-1 CPD ¶ 149; Aeroflex Int'l. Inc., B-243603.3, Oct. 7, 1991, 91-2 CPD ¶ 311; Triple Tool and Mfg. Co., Inc.--Recon., B-233269.3, Dec. 13, 1989, 89-2 CPD ¶ 547.

Balimoy next argues that its comments were sent by facsimile transmission at approximately 5:15 p.m. on November 23, and were thus timely filed even assuming receipt of the agency report by Balimoy on November 6. The protester argues that our time/date stamp (showing receipt by our Office on November 24) should not control, but the actual "time of transmission" should control. The protester has specifically asked our Office to examine our facsimile transmission records to verify timely receipt of its comments.

Generally, in determining whether an initial protest was timely filed with our Office, we rely upon our time/date stamp, unless there is other evidence to show actual earlier receipt. See Kenneth W. Ware--Recon., B-241170.2, Apr. 23, 1991, 91-1 CPD ¶ 397; Rapides Regional Medical Center--Recon., B-242601.2, June 28, 1991, 91-1 CPD ¶ 614; Custom Programmers Inc., B-235716, Sept. 19, 1989, 89-2 CPD ¶ 245. We apply the same rule here. As stated above, our time/date stamp showed receipt of the comments by our Office on the business day of November 24. We have examined the other evidence available, our facsimile records, which also show that the comments were not timely filed. Specifically, Balimoy's comments were three pages long; with a facsimile cover sheet, we would expect a transmission of four pages. Our records show that Balimoy made two transmissions near the close of business on November 23. The first transmission, starting at 5:25 p.m., was only one page long, apparently because of transmission difficulties. The second transmission, starting at 5:31 p.m. (after business hours), was four pages long and, we find, constituted its entire comments. Thus, since both our time/date stamp and facsimile records show a late filing of comments, we have no basis to reopen Balimoy's protest.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel